COURT'S ORDER WHETHER THE CASE IS OR IS NOT APPROVED FOR REPORTING
Chapter VIII, Rule 32(2)(b)}

Description of the Case

Writ Petition No.93 of 2005 (S/B) and four other connected Writ Petitions

Subedar Major Satish Chandra **...Petitioner**

Versus

Union of India and others ... **Respondents**

Approved for reporting
~~Not approved for reporting.~~

Date: April 5, 2006

(P.C. Verma, J.)

(B.C. Kandpal, J.)

Court No. 2
Reserved Judgment

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL.

(1) Writ Petition No. 93 of 2005 (S/B)

Subedar Major Satish Chanda Dwivedi (JC 174833 N)
G E (I) R & D, Raipur,
Dehradun (Uttaranchal)

..... Petitioner.

Versus

1. Union of India
   through Secretary Ministry of Defence
   South Block, New Delhi

2. Chief of the Army Staff,
   Army Headquarters,
   New Delhi.

3. Engineer-in-Chief
   Kashmir House,
   DHQ PO New Delhi- 110001.

4. OIC Records
   BEG Records, Roorkee,
   District-Haridwar, Uttaranchal.

..... Respondents.

(2) **Writ Petition No. 89 of 2005 (S/B)**

Subedar Major Sunil Kumar Verma (JC- 122934M)
G E (I) R & D, Raipur,
Dehradun (Uttaranchal)

..... Petitioner.

Versus

1. Union of India
   through Secretary Ministry of Defence
   South Block, New Delhi

2. Chief of the Army Staff,
   Army Headquarters,
   New Delhi.

3. Engineer-in-Chief
   Kashmir House,
   DHQ PO New Delhi- 110001.

4. OIC Records
   BEG Records, Roorkee,
   District-Haridwar, Uttaranchal.

..... Respondents.

(3) **Writ Petition No. 90 of 2005 (S/B)**

Subedar Visheshwar Prasad
Garrison Engineer (MES),
Dehradun (Uttaranchal)

..... Petitioner.

Versus

1. Union of India
   through Secretary Ministry of Defence
   South Block, New Delhi

2. Chief of the Army Staff,
   Army Headquarters,
   New Delhi.

3. Engineer-in-Chief
   Kashmir House,
   DHQ PO New Delhi- 110001.

4. OIC Records
   BEG Records, Roorkee,
   District-Haridwar, Uttaranchal.

..... Respondents.

(4) **Writ Petition No. 92 of 2005 (S/B)**

Subedar/ E & M Lakshmi Narayana (JC 305555K) Garrison Engineer (Projects),
Dehradun (Uttaranchal)

..... Petitioner.

Versus

1. Union of India
   through Secretary Ministry of Defence
   South Block, New Delhi

2. Chief of the Army Staff,
   Army Headquarters,
   New Delhi.

3. Engineer-in-Chief
   Kashmir House,
   DHQ PO New Delhi- 110001.

4. OIC Records
   BEG Records, Roorkee,
   District-Haridwar, Uttaranchal.

..... Respondents.

(5) **Writ Petition No. 94 of 2005 (S/B)**

Subedar Major Pradeep Singh Chahal (JC- 174765 L)
G E (I) R & D,
Dehradun (Uttaranchal)

..... Petitioner.

Versus

1. Union of India
   through Secretary Ministry of Defence
   South Block, New Delhi

2. Chief of the Army Staff,
   Army Headquarters,
   New Delhi.

3. Engineer-in-Chief
   Kashmir House,
   DHQ PO New Delhi- 110001.

4. OIC Records
   BEG Records, Roorkee,
   District-Haridwar, Uttaranchal.

..... Respondents.

Sri Lalit Kumar Advocate, learned counsel for the petitioner.
Learned Assistant Solicitor General for respondents/Union of India.

Dated: April 5, 2006

Hon'ble P.C. Verma, J.
Hon'ble B.C. Kandpal,J.

(Delivered by Hon'ble P.C. Verma, J.)

In all these writ petitions are petitioners are raising same grievance against the respondents and praying for the same reliefs. All these petitions were heard together and are being decided by this common judgment. Reliefs prayed for in these petitions are as under:-

(i) To issue a writ of mandamus to respondent No. 1 commanding them to frame the rules governing the conditions of service of the Direct Entry Junior Commissioned Officers

(in short DEJs) of Military Engineering Service **(in short MES)** as promised in Regulation No. 151 of the Defence Services Regulations for the Army 1962 Edition and reiterated in Regulation No. 150 of the DSR for the Army 1987 Edition, within a peremptory time period to be fixed by the Court in its wisdom.

(ii) To direct respondent No. 1 to ensure that the proposed service conditions of the DEJs of the MES, are at least equitable if not superior, to those of their civilian counterparts who joined the said MES with the same qualifications.

(iii) To stay the proposed discharge of the petitioner from service during the pendency of this writ petition.

(iv) To award suitable compensation and cost of this petition.

3. For the sake of convenience the brief facts of Writ petition No.93 of 2005 are narrated as under. The petitioner is a diploma engineer and member of the Military Engineering Service **(in short MES)** created by the Ministry of Defence in order to provide specified engineering services to Army, Air Forces, Navy, Ordnance Factories and Defence & Research Establishments in the country in accordance with the provisions of the Defence Services Regulations **(in short DSR)**- Regulations for the MES. The Head of the said MES is the Engineer-in-Chief/respondent No.3. The MES are organized by Army Commands under the administration of Chief Engineers

(CE), who act as technical advisor to the General Officers Commanding in Chief, Administrative Offices-in-Charge of Naval Commands, Air Officers in Charge and Director General of Ordnance Factories and are responsible for the execution of all engineering services for the Army, Navy, Air Force and Ordnance Factories within their jurisdiction. It is alleged that prior to 1962 the main force of the manpower of the said MES consisted of two classes of civilians, namely those who joined the MES after their degree courses in engineering and those who joined the MES after their three year diploma courses in engineering. While the former class of persons was given the gazetted posts in the designation of Engineers, the latter class of persons was given the non-gazetted posts in the designation of Superintendents. It was found that the Superintendents whose service conditions were governed by the civil services rules could not be transferred even in the face of war situations. Similarly, they could not be asked to be on duty at odd hours, in response to exigencies of service, unless they were paid overtime allowances. Thereafter a decision was taken by the Central Government/respondent No.1 to create a new cadre of persons for appointment as Superintendents in the MES holding the same three year diploma courses in roads, buildings, mechanical and electrical engineering who could be transferred to any place in India during war and peace. In order to counter weigh the harsh conditions of army discipline and to attract the right type of candidates, it was proposed to have these persons in Class II Gazetted posts and also to have their pay higher than the pay of their civilian counterparts of the corresponding rank and grade. Accordingly, the cadre of

DEJ was created through insertion of Regulation No. 151 in the Defence Services Regulations for the Army 1962 Edition. It is also alleged that Regulation 151 would make it clear that the terms and conditions applicable to other JCOs of the Army who were performing military duty of their rank as laid down in Regulation Nos. 153, 154 and 155 of the DSR for the Army, could not be applied to these DEJs and separate terms and conditions of service had to be laid down specifically for these persons. The petitioners being a Three-Year-Engineering Diploma holders, applied for the said post of DEJ in the MES in response to an advertisement and were selected for the same and appointed to the post of Naib Subedar which was a Class II Gazetted Post.

In May 1994, the petitioner was promoted to the rank of Subedar which was equivalent to Superintendent Grade I on the civilian side of the MES. His pay as Superintendent Grade I continued to be higher than the pay of his civilian counterpart. In the meantime a group of 13 civilian superintendents of the MES, approached the Central Administrative Tribunal, Bangalore Bench complaining against discrimination on the ground that the Junior Engineers in the CPWD of the Central Government, who had the same qualifications as they had, were getting higher scale of pay and their career prospects were also better than their own career prospects. The said cases were allowed by the CAT and the order has been implemented by the Central Government from 25th April, 1996. As a result of implementation of the said orders of the CAT, all the civilian counterparts of the petitioner with the same qualifications came to be designated as Junior Engineer

with better promotional prospects than the petitioner as they became eligible for promotion to the rank of Assistant Engineer, whereas the petitioner and his likes continued to be where they were. It is also alleged that the petitioner had been declared fit for promotion to the rank of Subedar Major. He was also informed that once promoted to the rank of Subedar Major, he would be eligible to serve only for four years thereafter as per DSR. The petitioner did not choose to forego the recognition of the same which was coming in the form of his promotion to the rank of Subedar Major. The petitioner did not give unwillingness certificate against his most deserved promotion and consequently he was promoted to the rank of Subedar Major on 29th August, 2001. At that time the petitioner was only 35 years old. The respondent No.4, vide its order dated 23rd February, 2004 has served the petitioner warning order for his proposed discharge from the Army with effect from 31st August, 2005 stating that on that day the petitioner would be completing the tenure of his rank. It is alleged that the petitioner's proposed discharge from service is arbitrary and illegal.

4. The petitioner has prayed for a writ of mandamus on the basis of facts stated in the writ petition that Regulation 163 which applies to the Subedar Major of the General Duty cadre of the Regular Army cannot be applied to the DEJs of the MES whose service conditions, though not laid down till date, cannot be inferior to those of his civilian counterparts in the same service, who retire on attaining the age of 60 years and in the rank of Executive Engineer. The petitioner has put in only 17 years of service and is only 39 years old

and would not be eligible even for full pensionary benefits. Therefore the Court may direct the respondents to lay down the conditions of service for the DEJs of MES as per Regulation No. 150 of DSR 1987 within a peremptory time period to be fixed by the Court in its wisdom and during the interregnum, stay the proposed discharge of the petitioner from service.

5. The claim of the petitioner in all these cases is contested by the respondents by filing counter affidavit stating therein that prior to 1995 Diploma Holder in JE (Civil) and JE (E & M) were recruited in the Military Engineering Service (MES) as Naib Subedar as per Govt. of India, Ministry of Defence Letter No. 78878/E 1A/1155-S/D (works II) dated 19.10.1963, contained in Annexure No. 1 to the counter affidavit filed in Writ Petition No. 93 of 2005. According to said letter, the civilians with requisite technical qualification were recruited in regular Army (MES Militarised Cadre) as Naib Subedar, as Direct Entry Junior Commissioned Officer (DEJ) for five years under the provision of Para 150 of the Defence Services Regulations for the Army, 1987. They were asked to submit their option for further extension of the service and accordingly they were brought on regular engagement by the same term and condition as applicable for the non-MES combatant JCO of the Army. The petitioners have also given their willingness to come under regular Army. It is not disputed that the petitioners were enrolled as direct entry JCO as Naib Subedar (MES Militarised Cadre) on fulfilling the criteria and have been promoted to the rank of Subedar Major. The petitioners' contention that the

discharge certificates were issued to them by misapplication of Regulation 163 of Defence Services Regulations-1987 was denied by the respondents. It is stated that the petitioners have already given their willingness to come under regular Army. It is also contended by the respondents that the commission of direct entry JCOs are granted under specific orders and the terms and conditions of their services are laid down specifically for first spell of their service, i.e. upto five years of service. Once they complete five years' service, willingness is asked from them to continue in the service. This willingness means that they are willing to accept the regular engagement and also willing to accept the same terms and condition applicable for the other JCOs of the Army. In view of paragraphs 3 & 6 of letter of Govt. of India, Ministry of Defence dated 29.12.1969 (Annexure 2 to the counter affidavit in Writ Petition No. 93 of 2005), the plea for having a separate set of rule for Direct Entry Junior Commissioned Officer (DEG) is not tenable.

6. We have heard the learned counsel for the parties at length and perused the material available on record. The learned counsel for the petitioners contended that possession of prescribed technical qualification by a person for grant of direct junior commission in the Army was a pre-requisite condition, there was no such condition laid down for grant of junior commission by promotion to a person holding the post of an NCO whose next promotion was to the post of JCO. Similarly, while the DEJs, irrespective of their military rank which was granted to them only for the purpose of giving them a class two gazetted status, were required to perform the

technical duties of Superintendents (now JE) in the MES which was an inter service organization under the Ministry of Defence, the JCOs by promotion were required to perform the administrative and other military duties relevant to their military rank in the Army. He also contended that the terms and conditions of service for JCOs by promotion were pre-existing in the Regulation No.165 of the DSR 1962, the terms and conditions of service for the DEJs were envisaged to be laid down in future. Further the terms and conditions of service of the JCOs by promotion would not apply to the DEJs, as the Government was required to frame the terms and conditions of service specifically for them. It was also contended that Regulation No.151 of Defence Services Regulations for the Army 1962 Edition makes it clear that the terms and conditions applicable to other JCOs of the Army who were performing military duty of their rank could not be applied to these DEJs and separate terms and conditions of service had to be laid down specifically for these persons. Regulation 151 above is reproduced as under:-

> **"151. DIRECT COMMISSION AS JCOs-** In very exceptional cases, direct commission as JCOs may be granted under the specific orders of the Government on terms and conditions of service to be laid down specifically for them."

7. It was also contended by the learned counsel for the petitioners that as promised the service rules for governing the terms and conditions of service of the DEJs were never framed by the Government as would be evident from perusal of Regulation No.150 of the said

DSR which was revised in 1987. The said Regulation No.150 is also being reproduced as under:-

> **"150. DIRECT COMMISSION AS JCOs-** In very exceptional cases, direct commission as JCOs may be granted under the specific orders of the Government on terms and conditions of service to be laid down specifically for them."

8. In view of these provisions in the Regulations, the petitioners have strictly relied and sought writ of mandamus.

9. The learned counsel for the petitioners placed reliance of the case **Smt. Seema versus Ashwani Kumar,** reported in 2006 AIR SCW, Page 858, wherein the Apex Court issued the directions to notify procedure for registration of marriages. We have gone through the said case law. The facts of this case are not applicable to the facts of present case. In the aforesaid case it was not a condition of service, but condition of registration as proof of marriage. Therefore, the Apex Court issued directions. In the instant case, it is condition of service to be laid down by suitable legislation or subordinate legislation.

10. The learned counsel for the petitioners also placed reliance of the case **Vishaka and others versus State of Rajasthan and others,** reported in AIR 1997 Supreme Court, Page 3011. The facts of the said case are entirely different to the facts of present case. In the said case the Hon'ble Supreme Court issued direction for prevention of violation of fundamental right of the victim.

11. The learned counsel for the petitioners also relied on the following portion of the judgment of the

Apex Court in the case **M/s Motilal Padampat Sugar Mills Co. Ltd. versus The State of Uttar Pradesh and others,** reported in AIR 1979 Supreme Court Page 621.

> ".....but it has been recognized as affording a cause of action to the person to whom the promise is made. The requirement of consideration has not been allowed to stand in the way of enforcement of such promise. The doctrine of promissory estoppel has also been applied against the Government and the defence based on executive necessity has been categorically negatived. **Where the Government makes a promise knowing or intending that it would be acted on by the promisee and, In fact, the promisee, acting in reliance on it, alters his position.** The Government would be held bound by the promise and the promise would be enforceable against the Government at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by **Art. 299** of the Constitution."

12. It is evident that it is a case of contract, wherein the promisee, if alters his position, the Government would be bound by the promise. Here in the instant case by framing the Regulation 150 of the DSR, which was revised in 1987, it cannot be said to be a promise as is evident from the language. Regulation does not require the petitioners to alter their position. However, the doctrine of promissory estoppel is attracted

in case of Government contract and it cannot be a ground to issue writ of mandamus as it is settled law that no mandamus can be issued to enforce a statutory duty cast upon the State. Therefore, the argument of the learned counsel for the petitioners based on this judgment is not correct.

13. It is settled law that writ of mandamus cannot be issued to the legislature to enact a particular legislation. It is equally settled that no mandamus can be issued to the Government to frame Rule under Article 309 of the Constitution of India as held by Hon'ble the Supreme Court in the case of **State of Jammu & Kashmir versus A.R.Zakki and others,** reported in 1992 Supp (1) Supreme Court Cases, Page 548. Para-10 of the said judgment is as under:-

> "In our opinion there is considerable merit in this submission. A writ of mandamus cannot be issued to the legislature to enact a particular legislation. Same is true as regards the executive when it exercises the power to make rules, which are in the nature o subordinate legislation. Section 110 of the J & K Constitution, which is on the same lines as Article 234 of the Constitution of India, vests in the Governor, the power to make rules for appointments of persons other then the District Judges to the Judicial Service of the State of J and K and for framing of such rules, the Governor is required to consult the Commission and the High Court. This power to frame rules is legislative in nature. A writ of mandamus cannot, therefore, be issued directing the State Government to make the rules in accordance with the proposal made by the High Court."

14. In case of **A.K.Roy versus Union of India and another** (and other connected cases), reported in A.I.R. 1982 Supreme Court, 710, the Constitution Bench of

Hon'ble Supreme Court has stated that no direction can be issued to the Government to issue notification for enforcement of the amendment made in Article 22 of the Constitution of India.

15. Regulations sought to be amended are statutory in nature or law within the meaning of Article 12 of the Constitution of India laying down the terms and conditions relating to tenure of the service. Therefore, in view of the aforesaid settled legal position, no mandamus can be issued to the respondents. Thus, we refused to grant the first and second prayer to the petitioners.

16. So far as third prayer is concerned, the petitioners were discharged on account of completion of their tenure as their appointment is of tenure appointment. Hence it cannot be said to be arbitrary or illegal. Therefore, the prayer No. 3 is also refused.

17. For the reasons recorded above, all these petitions fail and are hereby dismissed. No order as to costs.

(B.C. Kandpal, J.) **(P.C. Verma, J.)**

Dated: April 5, 2006
P.Singh